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DOES THE INTRODUCTION OF INDEPENDENT REDISTRICTING REDUCE CONGRESSIONAL PARTISANSHIP?

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ABSTRACT

In contemporary American politics, partisanship is frequently seen as excessive, even if some aspects of partisanship may fundamentally characterize the U.S. political system. To reduce partisanship in the process of drawing political districts, some states have implemented independent redistricting commissions and related forms of depoliticized systems for redistricting. This paper analyzes whether the presence of relatively independent redistricting also reduces partisanship in the voting behavior of congressional representatives elected from the relevant redefined districts. Contrary to the initial expectations of the authors, the evidence reviewed here suggests that politically independent redistricting seems to reduce partisanship in the voting behavior of congressional delegations from affected states in statistically significant ways. The authors conclude with notes about the study's implications for further research into redistricting and partisanship.

I. THE PERCEIVED PROBLEM OF EXCESSIVE PARTISANSHIP

FERVENT support for one political party's policies when alternative policies are championed by another political party—one way to define partisanship—may be a normal, unavoidable, and perhaps even desirable byproduct of the basic constitutional design of the American political system, with its structural divisions of governmental power and its effective enshrinement of two political parties. Certain evidence, though, suggests that some forms of partisanship in American political life are intensifying,¹

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1. See generally NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006).

even during a period that has been devoid of major structural changes in the nature of U.S. politics.² Recent books offer details fleshing out how partisanship may now pose serious problems for the effective functioning of basic American political institutions such as Congress.³ Editorial pages and political commentators routinely decry and denounce particular perceived examples of partisanship.⁴ Eyewitness insider accounts by longtime participants in congressional politics also suggest that partisanship is intensifying.⁵ A number of other onlookers view the present state of partisanship in U.S. politics as a modern political plague inviting reform.⁶ In

2. During the past fifty years, the two main parties have remained intact, as have the major branches of government. Despite some relatively minor nods to federalism in the jurisprudence of the Supreme Court, the national government continues to dominate over the state governments, and in most settings at the national level, the executive branch continues its practical primacy over the legislative and judicial branches. That is not to say that partisanship has not affected interactions between the congressional and executive branches of the federal government. On that narrow point, see JON R. BOND & RICHARD FLEISHER, *POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA* (2000).

3. See, e.g., JULIET EILPERIN, *FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES* (Hoover Studies in Politics, Econ., and Soc'y) (2006); HAYNES JOHNSON & DAVID S. BRODER, *THE SYSTEM: THE AMERICAN WAY OF POLITICS AT THE BREAKING POINT* (1996); THOMAS E. MANN & NORMAN ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA, AND HOW TO GET IT BACK ON TRACK* (Inst. of Am. Democracy Series, 2006).

4. See, e.g., Carl Hulse, *In Conference: Process Undone by Partisanship*, N.Y. TIMES, Sept. 26, 1997, at A1; Carl Hulse & Jeff Zeleny, *Partisan Anger Stalls Congress in Final Push*, N.Y. TIMES, Aug. 4, 2007, at A1; Editorial, *Of Bridges and Taxes*, WALL ST. J., Aug. 18, 2007, at A6; Editorial, *A Triumph for Pelosi*, WALL ST. J., Mar. 24, 2007, at A10.

5. See, e.g., EILPERIN, *supra* note 3, at 121 (quoting comments of Newt Gingrich); Lee H. Hamilton, *Why is Congress So Partisan?*, MACON TELEGRAPH, Aug. 18, 2007, available at http://congress.indiana.edu/radio_commentaries/why_is_congress_so_partisan.php.

6. Common Cause, for instance, has adopted this policy position: In order to make American's votes truly count in legislative and congressional elections, to create more accountability among elected officials and to put citizens, not elected officials, in charge of who gets elected, we must remove redistricting decisions from the purview of partisan legislators and establish fair criteria that guide the development of state and congressional districting plans.

Common Cause, *Redistricting*, <http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=196481> (last visited Feb. 17, 2009). On the other hand, the Voting and Democracy Research Center, which is affiliated with Fair Vote.org, endorses proportional voting arrangements with larger multi-member districts as more likely than independent redistricting to reduce marginalization of disfavored voter groups within districts dominated by one party:

The lessons of our years of research on Congressional elections indicate that resolving the gerrymandering dilemma is only part of the problem. Redistricting reform can minimize the ability of partisan legislators to punish their enemies and reward their friends, but for competitive elections, legislative diversity, and other public interest goals multimember districts with proportional voting are needed to maximize the effectiveness of these reforms—and ensure all voters have choices and no strong prospective candidate is shut out of a chance to participate.

light of such concerns, this Article examines whether the degree of partisanship, as shown by a widely used indicator of partisanship in the voting behavior of members of Congress, may be reduced by restricting the partisan manipulation of the redistricting process. In particular, this Article examines the implementation of relatively politically independent redistricting systems, which have been advocated by some reformers concerned about excessive partisanship.

A. *How This Paper Fits in with Other Literature on Partisanship and Redistricting*

In the 1962 case of *Baker v. Carr*,⁷ the Supreme Court began a new era of judicial review of redistricting, effectively overruling prior precedents.⁸ Justice Frankfurter had earlier warned that such a subject would be a “political thicket” ill-suited to judicial review.⁹ A steady parade of Court cases about redistricting has proceeded to emerge from that thicket, accompanied by a rich academic literature on the subject.¹⁰

Justice Frankfurter’s warning in 1946 about the difficulties of judicial review of redistricting seemed, in the 1960s and 1970s, to be overly alarmist. During this time, the Court managed relatively effectively to re-introduce and supervise periodic redistricting while defining and

Voting and Democracy Research Center, *Redistricting Reform Watch*, <http://www.fairvote.org/?page=1389> (last visited Feb. 17, 2009). An interesting discussion of the problems of partisanship and redistricting occurred on the PBS Newshour with Jim Lehrer among host Jim Lehrer, David Brooks, and Mark Shields. See *PBS Newshour* (PBS television broadcast Aug. 8, 2008), available at <http://www.pbs.org/news/hour/bb/politics/july-dec08/sbads/08-08.html> (providing transcript of broadcast).

7. 369 U.S. 186 (1962).

8. See *id.* (finding justiciable claim, and no political question, in equal protection challenge to longstanding Tennessee-sanctioned system of non-reapportionment that, through gradual shifts in population, had led to stark malapportionments in number of voters populating otherwise comparable districts). Although the Court in *Baker v. Carr* purported to distinguish *Colegrove v. Green*, 328 U.S. 549 (1946), and other cases, Justice Frankfurter in dissent noted that a dozen “political question” cases were in sharp conflict with the holding in *Baker*. Compare *Baker*, 369 U.S. at 202 (attempting to distinguish *Colegrove*), with *id.* at 266-67 (Frankfurter, J., dissenting).

9. See *Colegrove*, 328 U.S. at 556 (plurality opinion) (Frankfurter, J.) (“Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress.”).

10. See, e.g., *Wesberry v. Sanders*, 376 U.S. 1 (1964) (requiring that federal congressional districts be apportioned by states in order to ensure that voter populations within districts be same in size as much as practical); *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (acknowledging reason for state to respect existing political subdivisions, while nonetheless also requiring state to make “honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable”); *Gray v. Sanders*, 372 U.S. 368 (1963) (announcing concept of “one person, one vote” as constitutional right, while striking down Georgia’s county-unit primary system).

implementing the “one person, one vote” principle.¹¹ Since the 1980s, though, the Court has repeatedly been asked to extend its supervision of redistricting to the partisan gerrymander, a question sometimes intermingled with issues about the role of race in redistricting.¹² As the Supreme Court in more recent years has begun to focus on whether and how claims of partisan gerrymandering may be justiciable, Justice Frankfurter’s warning seems to echo more loudly than ever.¹³

Meanwhile, companion academic literature has become engrossed in the difficult analytical and legal questions in understanding partisan gerrymandering.¹⁴ Recent robust scholarship considers topics like the basic significance of partisanship in redistricting,¹⁵ the interplay between partisan and racial gerrymandering,¹⁶ analysis of the judicial role in reviewing partisan gerrymanders,¹⁷ and evaluations of procedural alternatives to redistricting that might have the effect of avoiding some of the perceived

11. See generally ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* (Arno Press 1974) (1907) (explaining that redistricting had largely halted in twentieth century as entrenched interests resisted change). In the nineteenth century, by contrast, redistricting had been common, as had political battles over gerrymandering. See *id.* For an interesting discussion of gerrymandering in the American republic until about 1842, see *id.*

12. The latter subject is governed by the quasi-constitutional Voting Rights Act, as amended in 1982. See, e.g., *Shaw v. Reno*, 509 U.S. 630 (1997).

13. See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (declining to find case of constitutionally offensive partisanship in political maelstrom of Texas’s mid-decade redistricting); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (finding by four justices that partisan gerrymandering is non-justiciable, finding by four other justices different tests for unconstitutionally partisan gerrymanders, and Justice Kennedy observing in middle that “workable standard” of excessive partisanship in gerrymandering had not yet but still might emerge); *Davis v. Bandemer*, 478 U.S. 109 (1986) (finding claim of partisan gerrymandering justiciable).

14. See, e.g., James A. Gardner, *A Post-Vieth Strategy for Litigating Partisan Gerrymandering Claims*, 3 *ELECTION L.J.* 643 (2004).

15. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *HARV. L. REV.* 593 (2002). But see Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 *HARV. L. REV.* 649 (2002) (taking issue with Professor Issacharoff’s proposal).

16. See, e.g., T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 *MICH. L. REV.* 588 (1993); John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 *U. MIAMI L. REV.* 489 (2002); John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 *STAN. L. REV.* 607 (1998); John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 *HARV. L. REV.* 576 (1997); J. Morgan Kousser, *Shaw v. Reno and the Real World of Redistricting and Representation*, 26 *RUTGERS L.J.* 625 (1995); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 *MICH. L. REV.* 483 (1993).

17. See, e.g., Mitchell N. Berman, *Managing Gerrymandering*, 83 *TEX. L. REV.* 781 (2005) (proposing decision rules for defining unconstitutionally excessive partisanship in gerrymandering); Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 *N.Y.U. L. REV.* 751 (2004) (arguing for imposition of limitation on mid-decennial redistricting, whether through judicial or legislative intervention).

problems with partisan redistricting.¹⁸ Without venturing into the depths of such discussion ourselves, we note that there seems to be growing suspicion that the federal judiciary may someday soon concede Justice Frankfurter's original point and withdraw from any more deep forays into the political thicket of redistricting. The Court may, for example, decline to seriously review claims of unconstitutionally excessive partisanship.¹⁹

Regardless of the outcome of that important, lively discussion about the preferable character of legal regulation and judicial review of redistricting, this Article responds to a separate set of concerns about partisanship as a general phenomenon in American political life. More specifically, this Article explores what, if any, relationship such general evidence of political partisanship in congressional politics has with the specific instance of partisanship in the redistricting process. This issue of partisanship in the redistricting process has more thoroughly engrossed the current legal academic literature to date.

By electing to address the relationship between general political partisanship and specific redistricting partisanship, the authors endeavor to begin to fill a noted research gap. University of California, Berkeley Professors Bruce Cain and Karin Mac Donald, and George Mason University Professor Michael McDonald, noted the gap in 2005.²⁰ In his 2007 review of their work, Jonathan Steinberg affirmed the existence of a research gap.²¹ Here is their claim:

No serious academic analyses attribute [partisan polarization in Congress] solely or even primarily to redistricting. There are many other plausible causes [suggesting that] the partisanship of elected officials is not simply a function of line drawing. But is legislative polarization even marginally affected by line drawing? There has been no final verdict on that question to date.²²

18. See, e.g., Jeanne C. Fromer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 GEO. L.J. 1547 (2005); Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L.R. 667 (2006); Jeffrey C. Kubin, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837 (1997); *Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1127, 1169-1176 (2006) (arguing that state judicial intervention is preferable to implementation of independent redistricting commissions in efforts to reduce partisanship).

19. Such withdrawal would seem to be the implications of *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006). But some commentators argue that state judiciaries may be more likely to pursue review of excessive political partisanship. See, e.g., Note, *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314 (2005).

20. See Bruce E. Cain, Karin Mac Donald & Michael McDonald, *From Equality to Fairness: The Path of Political Reform since Baker v. Carr*, in *PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING* 6, 20 (Thomas E. Mann & Bruce E. Cain, eds., 2005).

21. See Jonathan H. Steinberg, *Congressional Redistricting, Served Two Ways*, 6 ELECTION L.J. 322, 323 (2007) (describing Cain et al.'s aforementioned observation of research gap as "correct[]").

22. Cain et al., *supra* note 20, at 20.

Professor Nathaniel Persily of Columbia Law School, a prominent scholar of redistricting, also recently touched on the issue:

Is redistricting to blame [for party polarization]? I tend to think that the effect of redistricting on polarization has been overblown At least in theory, however, such a relationship between bipartisan gerrymanders and polarization has intuitive appeal, even if the data may not yet demonstrate that such a relationship exists.²³

At the outset, the authors of this Article took no position on whether there were, or were not, significant links between the two phenomena, and indeed were doubtful that any relationship would be found, given the skepticism of recognized authorities such as Professors Cain, Mac Donald, McDonald, and Persily. Moreover, after the research underlying this Article was largely complete, the authors were introduced to a draft study by Professors Nolan McCarty, Keith T. Poole, and Howard Rosenthal, from Stanford University, the University of California at San Diego, and New York University, respectively, considering whether gerrymandering causes polarization.²⁴ They conclude, “[p]olarization is not primarily a phenomenon of how voters are sorted into districts. It is mostly the consequence of the different ways Democrats and Republicans would represent the same districts.”²⁵ Although the McCarty, Poole, and Rosenthal study targets a different question than this Article, and its approach to analyzing its topic also differs considerably,²⁶ the gist of that study’s conclusion makes the results of the study underlying this Article comparatively intriguing.

B. *The Hypothesis That Strategic Redistricting Causes Excessive Partisanship in Other Political Behavior*

Although Professors Cain, Mac Donald, and McDonald noted a dearth of any “serious” scholarship about a possible relationship between redistricting partisanship and general political partisanship, more than a few well-respected political analysts have speculated openly about such a connection. Careful observers of and participants in a complex phenomenon such as political partisanship presumably would realize that a wide range of factors may have some bearing on such a matter. Therefore, in the case of the phenomenon of intensifying political partisanship, it is sur-

23. Nathaniel Persily, *Forty Years in the Political Thicket: Judicial Review of the Redistricting Process Since Reynolds v. Sims*, in *PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING* 67, 81-82 (Thomas E. Mann & Bruce E. Cain, eds., 2005).

24. See Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Does Gerrymandering Cause Polarization?* (Aug. 6, 2007) (unpublished draft).

25. *Id.*

26. For further discussion of how the McCarty et al. study differs from this Article’s study, see *infra* note 116.

prising that a number of these sophisticated insiderparticipant analysts have singled out one particular cause ahead of others: the redistricting process. On one hand, it is easy to see an approximate correlation between the return of regular redistricting after the 1960s²⁷ and a roughly simultaneous general increase in partisan rancor.²⁸ It is another thing, however, to explain a particular causal dynamic that would support the notion that the two general trends are not just coincidentally parallel.

Former Representative Lee H. Hamilton, a Democratic member of Congress from Indiana for thirty-four years, now studies partisanship from political retirement at Indiana University, where he directs the Center on Congress in addition to directing the Woodrow Wilson International Center for Scholars. In explaining why partisanship seems to be intensifying, Hamilton points to the redistricting process:

How did we get here? . . . For one thing, computers have enabled state legislators—or members of Congress eager to dictate to them—to draw congressional district lines that create safe Democratic or Republican districts. The result is that politicians running for the U.S. House don't have to appeal to the center to win, they need to appeal to the core of their parties' supporters.²⁹

Former Republican House Speaker Newt Gingrich, considered a vigorous partisan during his own tenure in the House, seems to join with Representative Hamilton in singling out the redistricting dynamic as a significant cause of partisan "isolation." He notes:

[Democrats] get to rip off the public in the states where they control and protect their incumbents, and we get to rip off the public in the states we control and protect our incumbents, so

27. Redistricting disappeared throughout much of the United States during the first half of the twentieth century. The Supreme Court finally entered the festering controversy about urban voter disenfranchisement by overruling its prior decisions in the 1962 case of *Baker v. Carr*, which held that the so-called "one man, one vote" doctrine of legislative district voter population parity would be acknowledged as a judicially enforceable constitutional requirement. See generally GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* (2002).

28. See Cain et al., *supra* note 20, at 20 ("Party polarization in Congress and many state legislatures has been on the rise since the 1980s, and it has reached levels comparable to those in the late nineteenth and early twentieth centuries." (citing Gary C. Jacobson, *Explaining the Ideological Polarization of the Congressional Parties Since the 1970s* (Apr. 15, 2004) (presented at the Annual Meeting of the Midwest Political Sci. Assoc., Chicago); David Brady & Hahrie Han, *An Extended Historical View of Congressional Party Polarization* (Dec. 2, 2004) (presented at Princeton Univ.); Nolan McCarty, Keith Poole & Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches* (Univ. of Cal., Berkeley Ctr. on Inst. and Governance, Inst. of Governmental Studies, Working Paper No. 5, 2005))).

29. Hamilton, *supra* note 5.

the public gets ripped off in both circumstances In the long run, there's a downward spiral of isolation.³⁰

Another veteran House member, Republican Jim Leach of Iowa, shared the same basic view while in office: "[R]edistricting has made Congress a more partisan, more polarized place. The American political system today is structurally geared against the center"³¹

Experienced political insiders in state politics have developed impressions about the effect of partisanship in redistricting on state politics that parallel the views of Hamilton, Gingrich, and Leach about redistricting's effects on federal congressional partisanship. Two politically secure, second-term state governors, one a Democrat in a partly Democratic-controlled state, Governor Brad Henry of Oklahoma, and another a Republican in a Republican-controlled state, Governor Sonny Perdue of Georgia, have gone so far as to propose the implementation of independent redistricting commissions in their states. The governors initiated these reforms—even though such arrangements would appear to disadvantage their parties—in order, they state, to facilitate less partisanship in overall state politics.³² Further, Oklahoma Governor Henry was quoted as saying that "until we revamp our redistricting process, it will be difficult to take the politics out of the business here at the Capitol. . . . [L]egislators in those safe seats don't tend to be more balanced in their approach."³³ Without specifically articulating a presumed connection between partisan redistricting and party polarization, Georgia Governor Perdue still generally noted, when proposing a redistricting commission, "[y]ou can't take politics out of politics, but an independent commission would come closer."³⁴

The hypothesis that strategic partisan redistricting leads to a structure of incentives that encourage politicians to be pushed to partisan extremes in their representation is recited frequently as the product of an inexorable cause and effect. Politicians are not alone in suspecting a connection, and suggesting how it may work. *Washington Post* reporter Juliet Eilperin, in her popular 2006 book on partisanship, described the presumed mechanism as follows:

Now mapmakers can get detailed information about an area's political makeup—down to the voting history of a single block—and plug it into a computer, allowing them to carve up neighbor-

30. EILPERIN, *supra* note 3, at 121 (quoting Newt Gingrich).

31. Jeffrey Toobin, *The Great Election Grab*, THE NEW YORKER, Dec. 8, 2003, at 63 (quoting Representative Leach).

32. See Janice Francis-Smith, *Oklahoma Governor Henry: Redistricting Key to Creating Bipartisanship*, THE JOURNAL RECORD (Okla. City, Okla.) Feb. 2, 2007; Walter C. Jones, *Partisan Drawing Decried*, AUGUSTA CHRONICLE (Augusta, Georgia), Feb. 23, 2007, at B5.

33. Francis-Smith, *supra* note 32.

34. Jones, *supra* note 32.

hoods with precision. The new software ensures both parties can maximize their partisan advantage in a congressional district, provided they have enough political clout to shepherd a map into law. . . . [T]he men and women who drew the nation's current congressional districts made the House less accountable to the public and more divided as a body.³⁵

The supposed dynamics at play can be restated in the terms of rudimentary political game theory. Strategic partisan redistricting from the parties' perspectives is intended to maximize the impact of voters favoring the redistricting party, and to minimize the impact of voters favoring the other party, in situations where one party controls redistricting. From the individual candidate's personal perspective, the principal goal is slightly different: to maximize the chance of easy election or re-election in a particular district, while simultaneously advancing to the extent possible the chance of the candidate's party to achieve gains and/or preserve overall majority status.

The incentives for the redistricting players—parties and politicians—can theoretically coalesce by having the redistricting process operate to “pack” all relevant districts (in bipartisan gerrymandering situations where the parties agree to protect all incumbents) or at least to pack the districts of the minority party (in partisan gerrymandering situations), thereby increasing the absolute number of safe seats whose holders are insulated with ample margins of victory. Those safe-seat holders, the thinking goes, may be less concerned with the awkward political job of appealing to cross-party-leaning constituents, and more concerned with appealing to the core constituents of the district's dominant party to defend against potential challengers in a primary. This overarching, commonly touted theory is, in shorthand, that strategic partisan and bipartisan redistricting causes excessive partisanship in the subsequent political life of candidates for and holders of office in the affected districts.

Although there were not many attempts until the recent draft paper by Professors McCarty, Poole, and Rosenthal to actually measure the potential relationship between partisanship and redistricting, serious scholars have at least pondered the question. For example, New York University Law Professor Samuel Issacharoff has described the presumed structure of incentives: “Partisan gerrymandering skews not only the positions congressmen take but also who the candidates are in the first place You get more ideological candidates, the people who can arouse the base of the party, because they don't have to worry about electability. It's becoming harder to get things done”³⁶ Rutgers University Professors Alan Tarr and Robert Williams make similar general claims: “Safe seats mean that legislators do not have to seek the political middle, because

35. EILPERIN, *supra* note 3, at 92-93.

36. Toobin, *supra* note 31 (quoting Professor Issacharoff).

their electoral prospects do not depend for support from independent voters and members of the opposing party.”³⁷

Distinct possibilities exist that even brazenly partisan redistricting strategies can be more complex than any simple “packing” approach,³⁸ that there are many other complex structures of incentives facing both parties in their redistricting decisions and politicians in their voting behaviors,³⁹ and that “independent” redistricting processes may not be very independent of partisan considerations.⁴⁰ Despite these possibilities, this Article, for the sake of argument, accepts at face value the hypothesis that partisan redistricting may foster partisanship in the behaviors of congressional representatives. The point here is simply to test the strength of the supposed connection in an inverse situation.

II. INDEPENDENT REDISTRICTING AS A PROPOSED ANTIDOTE TO PARTISANSHIP

In short, if politicized methods of redistricting exacerbate partisanship in broader political contexts, then it is possible that depoliticizing the methods of redistricting may reduce broader examples of partisanship. This proposition is a common companion of the basic underlying hypothesis that strategic redistricting causes partisanship. Former Representative Hamilton, for example, has joined the reform movement advocating that a plausible antidote to excessive partisanship may be, at least in part, to wrest control of the redistricting process from the political parties: “Perhaps [change reducing congressional partisanship will come from] a move in some states to abandon partisan redistricting and move to some more neutral way of drawing lines. . . . [E]ven little moves in the right direction would be an improvement over the situation as it stands today.”⁴¹ This paper attempts to test whether depoliticization of the redistricting process can in fact produce reductions in generally excessive partisanship, as Representative Hamilton has surmised. Does abandonment of a more partisan form of redistricting ultimately result in even a little reduction in partisanship behavior by congressional representatives elected to re-

37. G. Alan Tarr & Robert F. Williams, *Eighteenth Annual Issue on State Constitutional Law: Introduction*, 37 RUTGERS L.J. 877, 878 (2006).

38. See generally STEVE BICKERSTAFF, LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY (2007).

39. See Nolan McCarty, Keith Poole & Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches*, (Univ. of Cal., Berkeley Ctr. on Inst. and Governance, Inst. of Governmental Studies, Working Paper No. 5, 2005) (suggesting, among other things, that party affiliation and discipline may explain more about voting behavior of politicians than circumstances of district boundaries and constituency characteristics); see also MCCARTY, POOLE, & ROSENTHAL, *supra* note 1.

40. See Gene R. Nichol, Jr., *The Practice of Redistricting*, 72 U. COLO. L. REV. 1029, 1030 (2001) (recounting anecdotal comment by member of Colorado’s commission that commission had reduced politics in redistricting from 100 to 98 percent).

41. Hamilton, *supra* note 5.

present districts that are drawn through relatively depoliticized redistricting processes?

Incidentally, the authors readily acknowledge that there may well be ways of reducing raw party opportunism in redistricting, other than through the utilization of relatively depoliticized independent redistricting commissions, advisory panels, panels of judges, or the like. Professor Issacharoff, for instance, has proposed a categorical, constitutionally based, and judicially enforced proscription against any partisanship in redistricting, whatever the vehicle.⁴² Emory Law Professor Kang, on the other hand, in his *Washington University Law Review* article, has proposed more direct democratic involvement by the voting public in picking among alternative redistricting plans, reasoning that transparency of and public involvement in the process would improve the quality of what is inevitably an inherently political result.⁴³ By studying the effects of relatively independent redistricting commissions, the authors of this Article do not mean to endorse any particular device for depoliticizing redistricting, or even to discount Professor Kang's conceptually different and transparently politicized approach to reducing raw partisanship in the crafting of political districts.

Going further, the authors recognize that the whole premise that partisanship is a "harm," whether in the particular case of redistricting or in the more general case of representative voting behavior, may be mistaken if partisanship is re-conceptualized. One can imagine a defense of partisanship as enhancing the distinctiveness of electoral options, sharpening the outlines of policies, providing a potential platform for a third party to challenge the amazingly resilient system of political party duopoly, or fairly expressing the will of a fundamentally polarized electorate.⁴⁴ One can even imagine partisanship just as an expression of the "truth" that one partisan approach is right in some absolute sense, and another approach

42. See Issacharoff, *supra* note 15, at 647-48 (advocating eliminating control of redistricting by partisan officials). But see Persily, *supra* note 15, at 650 (2002) (taking issue with Professor Issacharoff's proposal).

43. See Kang, *supra* note 18, at 668-69 (proposing requirement of democratic approval for redistricting plans).

44. See Bill Bishop, *The Schism in U.S. Politics Begins at Home*, AUSTIN AMERICAN-STATESMAN, Apr. 4, 2004, at A1 (noting that American public is evenly split politically at national, but not local level). The *Austin American-Statesman* conducted an interesting survey of historical voting patterns demonstrating that "[t]oday, most Americans live in communities that are becoming more politically homogenous and, in effect, diminish dissenting views. And that grouping of like-minded people is feeding the nation's increasingly rancorous and partisan politics." See *id.* (observing occurrence of political polarization at community level); see also Aaron B. Wildavsky, *Choosing Preferences by Constructing Institutions*, 81 AM. POL. SCI. REV. 3, 8 (1987) (describing hypothesis that social relationships provide foundation for political preferences). From a theoretical perspective, Professor Wildavsky has proposed a cultural explanation for how members of the public, largely disengaged from the details of complex political policies, can nevertheless generate clear preferences about those policies. See Wildavsky, *supra*, at 8.

wrong, to an extent that justifies incidental ill effects from insistence on the “right” principle.⁴⁵ Such discussions, however, are for another day.

A. *The Types of Redistricting Processes*

Ryan Bates, in his *Duke Law Journal* Note, has already ventured a rough outline of the different types of independent redistricting systems practiced by several states.⁴⁶ In short, Bates proposes a typology of “primary” commissions that have presumptive authority for redistricting, “backup” commissions that come into play only when the legislature reaches a stalemate or otherwise defers to the commission, and “advisory” commissions that participate at an early stage by offering a nonbinding plan, leaving the final decision in the legislature’s hands.⁴⁷ The Bates typology is further refined by accounting for variations in the commissions’

45. See Tom DeLay, Farewell Address (June 8, 2006), available at <http://www.americanrhetoric.com/speeches/tomdelayhousefarewell.htm> (defending role of partisanship in political process). This last argument was unabashedly articulated by former House Speaker Tom DeLay from the well of the House as he retired under pressure of a criminal indictment, asserting his own involvement in illegal political maneuvers in the alleged pursuit of partisan gain:

You show me a nation without partisanship, and I’ll show you a tyranny. For all its faults, it is partisanship, based on core principles, that clarifies our debates, that prevents one party from straying too far from the mainstream, and that constantly refreshes our politics with new ideas and new leaders. Indeed, whatever role partisanship may have played in my own retirement today or in the unfriendliness heaped upon other leaders in other times, Republican or Democrat, however unjust, all we can say is that partisanship is the worst means of settling fundamental political differences—except for all the others.

Now, politics demands compromise. And Mr. Speaker, and—even the most partisan among us have to understand that. But we must never forget that compromise and bipartisanship are means, not ends, and are properly employed only in the service of higher principles. It is not the principled partisan, however obnoxious he may seem to his opponents, who degrades our public debate, but the preening, self-styled statesman who elevates compromise to a first principle. For the true statesman, Mr. Speaker, we are not defined by what they compromise, but [by] what they don’t. Conservatives, especially less enamored of government’s lust for growth, must remember that our principles must always drive our agenda and not the other way around.

Id.

DeLay’s defense of partisanship from the right as a matter of principle is matched by *New York Times* columnist Paul Krugman’s defense of partisanship from the left, also on grounds of principle:

[A candidate can’t] transcend partisanship in an age when that’s neither possible nor desirable. . . . We all wish that American politics weren’t so bitter and partisan. But if you try to find common ground where none exists—which is the case for many issues today—you end up being played for a fool.

Paul Krugman, *Played for a Sucker*, N.Y. TIMES, Nov. 16, 2007, at A33.

46. See Ryan P. Bates, Note, *Congressional Authority to Require State Adoption of Independent Redistricting Commissions*, 55 DUKE L.J. 333, 347-51 (2005).

47. See *id.* at 347-48.

membership structure. Bates notes that commission membership can vary in terms of the bipartisanship of membership, the extent of “blue-ribbon” membership defined by other, often political, positions held, and whether a deadlocked bipartisan panel has a tie-breaking member from outside the immediate political arena.⁴⁸

A survey of the redistricting systems of fifty states conducted during 2006 and 2007 at Mercer University Law School by Professor David Oedel, referred to as “the Mercer Study,” confirms Bates’s general typology and supplements it by considering the redistricting systems in the states that do not have independent or semi-independent redistricting systems. The Mercer Study finds that several states have adopted relatively independent redistricting commissions, that a variety of other techniques exist to address partisan logjams in redistricting, and that the largest group of states still treats the redistricting process as inherently political, to be worked out either at the discretion of any party effectively controlling the process, or in bipartisan ways when different parties control different houses of the state legislatures and/or the governor’s office.⁴⁹ The Mercer Study is the basis for a very rough ranking of redistricting approaches across the country in terms of their relative partisan depoliticization or politicization, as outlined below.

B. *Results of the Mercer Study of Redistricting Systems (2006-2007): Degrees of Politicization in the Various Types of U.S. Redistricting Systems (Relatively De-Politicized Systems Ranked First)*

1. Category 1: States with primary, binding, and independent redistricting commissions, whose memberships include a non-political tie-breaker.

States included in Category 1 have a primary, binding, and independent redistricting commission. The membership is designed to draw an equal number of members from the two major parties, but the membership is uneven due to an ostensibly independent chairman or “tie-breaking” member. The legislature must accept the redistricting plan of the commission and the governor has no veto power. The commission draws both the state legislative districts and the U.S. congressional districts.

48. See *id.* at 349-51. Iowa’s system of an agency conducting the redistricting function is described as unique, and outside of Bates’s typology. See *id.* at 349.

49. See David Oedel, Mercer Study (2007) (unpublished, on file with Mercer University Law School Furman Smith Law Library). The study was undertaken to support the work of a blue-ribbon task force on Georgia redistricting reform appointed by Governor Sonny Perdue.

States in this category include Arizona,⁵⁰ Hawaii,⁵¹ New Jersey,⁵² and Washington.⁵³

2. Category 2: States with fully independent redistricting commissions for state legislative districting, but due to small populations, whose federal congressional districts are at large (i.e., permitted just one congressional representative).

Category 2 states have a primary, binding independent redistricting commission. The membership is designed to draw an equal number of members from the two major parties, but the membership is uneven due to an ostensibly independent chairman or “tie-breaking” member. The legislature must accept the redistricting plan of the commission and the governor has no veto power. The commission draws the state legislative districts, but there is no power delegated to such commissions for the drawing of federal congressional districts because the state has only one

50. See ARIZ. CONST. art. IV, pt. 2, § 1 (establishing independent redistricting commission for U.S. congressional and state legislative districts consisting of five members, of which no more than two will be from same political party, and prohibiting members from seeking elected office within three years of membership); see also Arizona Independent Redistricting Commission, Proposition 106, <http://www.azredistricting.org/?page=prop106> (last visited Feb. 17, 2009) (providing text of Proposition 106, which amended Arizona Constitution redistricting procedure).

51. See HAW. CONST. art. IV, §§ 2, 9 (requiring state reapportionment commission—comprised of eight members selected by state legislative leaders from each of Hawaii’s major parties, and chairman selected by eight appointed members—to establish U.S. congressional district lines by majority vote, which will become law upon publication by chief election officer, and further providing that commission members are restricted from seeking elective office for first two election cycles following redistricting); see also State of Hawaii Office of Elections, Factsheet Reapportionment, <http://www.hawaii.gov/elections/factsheets/fsbo141.pdf> (last visited Feb. 17, 2009) (detailing information and procedures on reapportionment).

52. See N.J. CONST. art. II, § 2 (authorizing New Jersey Redistricting Commission to establish congressional districts after each federal census, and providing that commission is to consist of eight members appointed by two major party leaders of state house and senate, four members selected by chairmen of state committees of two major political parties, and one chairman, who shall not have held public office in last five years, selected by appointed members); see also New Jersey Legislature—Constitution, <http://www.njleg.state.nj.us/lawsconstitution/consearch.asp> (last visited Feb. 17, 2009) (providing full text of New Jersey Constitution).

53. See WASH. CONST. art. II, § 43 (establishing authority of commission to provide for state legislative and U.S. congressional districts in each year ending in one; requiring commission to be comprised of four members appointed by legislative leaders of each of two major political parties, and fifth non-voting member selected by initially appointed members, though redistricting plan requires approval of only three members; providing that elected officials are not eligible for memberships, and districts may not be drawn purposely to favor or discriminate against any party or group; requiring that plan be approved by January 1st of each year ending in two, or state supreme court shall adopt independent plan; and stating that plan may be amended only by vote of two-thirds of legislature); see also Washington State Redistricting Commission, <http://www.redistricting.wa.gov> (last visited Feb. 17, 2009) (providing media information on redistricting efforts).

congressional district. States in this category include Alaska,⁵⁴ Delaware (Blue-Ribbon),⁵⁵ and Montana.⁵⁶

3. Category 3: States with primary, binding, and bipartisan redistricting commissions, but with no nonpolitical tie-breaking member.

States falling into Category 3 have a primary, binding, and independent redistricting commission. The membership is designed to draw an equal number of members from the two major parties. There is no independent chairman or "tie-breaking" member, potentially resulting in deadlock. The legislature must accept the redistricting plan and the governor has no veto power. The commission draws both the state legislative and federal congressional districts. This category is comprised of the states of Idaho,⁵⁷ Michigan (as to state districts),⁵⁸ and Missouri (as to

54. See ALASKA CONST. art. VI, § 8 (establishing five-member redistricting board of non-public employees appointed in year in which federal census is taken; providing that board is comprised of two appointees of governor and one appointee of each of state senate president, state speaker of house, and chief justice of state supreme court; and stating that board is responsible for drawing state house and senate districts); see also About Redistricting, http://www.state.ak.us/redistricting/a_articlevi.htm (last visited Feb. 17, 2009) (providing Alaskan constitutional provisions on legislative apportionment).

55. See DEL. CONST. art. II, § 2A (following federal census, state house and senate districts are drawn by commission consisting of governor, as chairman, and state chairmen of two major political parties, and shall be drawn with concern for equal population, natural and ancient boundaries, contiguous territory, and without favor to any party).

56. See MONT. CONST. art. V, § 14 (establishing commission of five members, none of whom are public officials, to be selected for purposes of drawing state house and senate districts, and U.S. congressional districts when necessary; providing that majority and minority leaders of house and senate each appoint one member, and appointed members select chairman; and stating that plan shall be submitted ninety days after federal census data is available to secretary of state, and it shall become law); see also Final Legislative Redistricting Plan, http://leg.mt.gov/content/committees/interim/2001_2002/dist_apport/2000_rpt_sos.pdf (last visited Feb. 17, 2009) (giving details of redistricting plan).

57. See IDAHO CONST. art. III, § 2 (providing that commission for reapportionment is to be formed by order of secretary of state where there is reason to reapportion state legislature or new U.S. congressional district boundaries, and stating that commission is comprised of six members: four of which are designated by leaders of two major political parties in state house and senate, and two of which are designated by state party chairmen of two major political parties, but no members may be elected officials or run for elected office five years after serving on commission).

58. See MICH. CONST. art. IV, § 6 (establishing commission on legislative apportionment for purposes of apportioning and creating districts for state house and state senate only; requiring that apportionment be done with regard to state constitutional requirements; and providing that eight members are selected evenly by party leaders of state house and senate, and chairmen of state parties, who shall be restricted from public office for two years after apportionment is effective); see also 2007 Senate Joint Resolution A, <http://www.michiganvotes.org/2007-SJR-A> (last visited Feb. 17, 2009) (describing resolution to create bipartisan redistricting commission).

state districts).⁵⁹

4. Category 4: States with primary, binding, and semi-independent redistricting commissions whose blue-ribbon members have separate political roles as well.

The states in Category 4 have a primary, binding redistricting commission. The commission membership is “blue ribbon” in the sense that members are selected on the basis of their other official roles in government, usually political in nature, which often has the effect of weighting the membership in favor of one of the two major parties. The legislature must accept the redistricting plan and the governor has no veto power. The commission draws both the state legislative and federal congressional districts. The two states in this category are Arkansas (as to state legislative districts)⁶⁰ and Ohio (as to state legislative districts).⁶¹

5. Category 5: States with no independent redistricting commission, but a court is empowered to redistrict after a redistricting deadline passes.

Category 5 states vest redistricting authority in the legislature. If the legislature is unable to enact a legally compliant redistricting plan by a statutory or reasonable deadline, however, the courts will intervene to enact a binding redistricting plan. The states in this category include Ala-

59. See MO. CONST. art. III, § 2 (establishing committee consisting of one member from each party in each of Missouri’s U.S. congressional districts to draw plan for districts of state house of representatives, and providing that members are disqualified from public office for four years after participation); MO. CONST. art. III, § 7 (establishing commission of ten members, evenly divided among two major parties, appointed by governor from list of nominees provided by state party chairmen for purpose of drawing state senate districts, and requiring members to be disqualified from public office for four years after participation); *see also* FairVote – Missouri, <http://www.fairvote.org/?page=315> (last visited Feb. 17, 2009) (noting that Congressional districts are drawn by state legislature).

60. See ARK. CONST. art. VIII (establishing Board of Apportionment consisting of governor, secretary of state, and attorney general to apportion districts for state house and senate); *see also* Arkansas Board of Apportionment, <http://www.state.ar.us/arkdistrict/legal.html> (last visited Feb. 17, 2009) (describing history of Arkansas Board of Apportionment). Congressional districts are drawn by the state legislature.

61. See OHIO CONST. art. XI, § 1 (granting authority to governor, auditor of state, secretary of state, and two persons chosen by leaders of each party of state house and senate to apportion districts of state general assembly); *see also* Constitution Online, <http://www.legislature.state.oh.us/constitution.cfm?Part=11&Section=01> (last visited Feb. 17, 2009) (providing reapportionment provision of state constitution). Congressional districts are drawn by the state legislature.

bama,⁶² California,⁶³ Connecticut,⁶⁴ Florida,⁶⁵ Iowa (as to state legislative districts),⁶⁶ Louisiana (as to state legislative districts),⁶⁷ Maine,⁶⁸ Minne-

62. See ALA. CONST. art. IX, § 198 (providing that redistricting is initial responsibility of Alabama state legislature); *Brooks v. Hobbie*, 631 So. 2d 883, 889-90 (Ala. 1993) (holding that following legislative failure to redistrict U.S. congressional districts, court has authority to adopt redistricting plan); see also Welcome to the Alabama State Legislature, <http://www.legislature.state.al.us/reapportionment/reap.html> (last visited Feb. 17, 2009) (providing materials from state's committee on reapportionment and redistricting).

63. See CAL. CONST. art. XXI, §§ 1-2 (authorizing state legislature to create U.S. congressional districts with limitations in regard to single-member districts, reasonable population equality, contiguity, and geographical integrity); *Wilson v. Eu*, 823 P.2d 545, 547 (Cal. 1992) (finding that California Supreme Court has authority to amend and adopt redistricting plan if legislature is unable to approve plan in time for upcoming election); see also Statewide Database, <http://swdb.berkeley.edu/about.html> (last visited Feb. 17, 2009) (establishing online redistricting database for California).

64. See CONN. CONST. art. III, § 6, *amended by* CONN. CONST. art. XII, art. XVI, § 2, art. XXVI, and art. XXX, § 2 (providing authority for Connecticut legislature to create U.S. congressional districts; requiring two-thirds vote of each house for passage of redistricting plan; and stating that legislative failure to adopt plan will result in formation of nine-member bipartisan binding independent redistricting commission, and failure of that commission to agree on plan allows Connecticut Supreme Court to intervene and compel commission to enact plan or otherwise establish redistricting plan); see also CT Constitution, Article 3, Section 6, <http://www.cga.ct.gov/red/section6article3.htm> (last visited Feb. 17, 2009) (discussing reapportionment procedure).

65. See FLA. CONST. art. III, § 16 (granting apportionment powers to state legislature, providing for special apportionment session in event that legislature is unable to adopt plan at adjournment of general session, and allowing Florida Supreme Court to order redistricting plan in event that special apportionment session does not yield statutorily compliant plan); see also House Redistricting Committee, <http://www.floridaredistricting.org/ConstRequirements.html> (last visited Feb. 17, 2009) (providing state constitution's provisions concerning apportionment).

66. See IOWA CONST. art. III, § 36 (granting Iowa Supreme Court authority to review apportionment plans of Iowa General Assembly, and order compliant plan be enacted or otherwise cause plan to be enacted); see also Iowa Redistricting Profile, <http://www.legis.state.ia.us/Redist/profile.pdf> (last visited Feb. 17, 2009) (outlining redistricting information).

67. See LA. CONST. art. III, § 6 (granting Louisiana Supreme Court authority to establish districts for state house and senate in event legislature fails to produce compliant redistricting plan by end of year following year of report of federal decennial census); see also FAQ's-Redistricting Louisiana, <http://house.legis.state.la.us/hredist/redist-faq.htm> (last visited Feb. 17, 2009) (answering frequently asked questions about redistricting).

68. See ME. CONST. art. IV, pt. 1, § 3 (granting Maine Supreme Court authority to enact apportionment plan for Maine's U.S. congressional districts upon failure of Maine legislature to agree on plan within 130 calendar days after convening); see also FairVote—Maine, <http://www.fairvote.org/?page=309> (last visited Feb. 17, 2009) (summarizing information and issues on redistricting).

sota,⁶⁹ New Hampshire,⁷⁰ and South Dakota (inapplicable to U.S. congressional district, which is at large).⁷¹

6. Category 6: States with semi-independent “back-up” redistricting commissions with a tie-breaking member.

Category 6 states have a binding independent redistricting commission. The membership is designed to draw an equal number of members from the two major parties, but the membership is uneven due to an ostensibly independent chairman or “tie-breaking” member. The commission is not active until the state legislature fails to enact a legally compliant plan by a statutorily imposed deadline. States falling into this category are Illinois⁷² and Indiana (as to U.S. congressional districts only).⁷³

7. Category 7: States with semi-independent “blue-ribbon” back-up redistricting commissions.

69. See MINN. CONST. art. IV, § 2 (granting authority to Minnesota legislature to establish redistricting plan for U.S. congressional districts); *Zachman v. Kiffmeyer*, 629 N.W.2d 98, 98 (Minn. 2001) (recognizing judicial authority to establish redistricting plan where legislature is unable to adopt plan in reasonable time before election); see also MN Legislature—MN Redistricting Profile, <http://www.gis.leg.mn/html/red-prof.html> (last visited Feb. 17, 2009) (listing references and information about redistricting).

70. See N.H. CONST. pt. 2, art. IX (establishing initial authority in legislature to create apportionment plan); *In re Below*, 855 A.2d 459, 462-63 (N.H. 2004) (authorizing New Hampshire Supreme Court to perform redistricting where legislature fails to do so before election); see also Fair Vote—New Hampshire, <http://www.fairvote.org/?page=319> (last visited Feb. 17, 2009) (summarizing background and other issues concerning redistricting).

71. See S.D. CONST. art. III, § 5 (granting authority of South Dakota legislature to reapportion state into districts that are compact, contiguous, and as equally populated as practicable, but requiring that where legislature is unable to do so by statutory deadline, Supreme Court is responsible for apportionment); see also FairVote—South Dakota, <http://www.fairvote.org/?page=331> (last visited Feb. 17, 2009) (presenting background information about redistricting).

72. See ILL. CONST. art. IV, § 3 (establishing initial authority to create U.S. congressional districts in Illinois General Assembly, and requiring that district be compact, contiguous, and substantially equal in population; further providing that if Illinois General Assembly is unable to approve redistricting plan by statutory deadline, eight member commission comprised of both state representatives and unelected persons appointed by leaders of two major parties of Illinois General Assembly shall file redistricting plan upon approval of five members; and stating that deadlock by commission past statutory deadline will be resolved by random selection by secretary of state of additional tie-breaking member from two names submitted by Supreme Court); see also Illinois Constitution—Article 4, <http://www.ilga.gov/commission/lrb/con4.htm> (last visited Feb. 17, 2009) (providing state constitution’s redistricting provisions).

73. See IND. CODE ANN. § 3-3-2-2 (LexisNexis 2002) (authorizing commission consisting of speaker of house, president pro tempore of senate, chairman of senate and house committees responsible for redistricting, and fifth member appointed by governor from membership of general assembly to adopt redistricting plan upon failure of general assembly to do so); see also Indiana Code 3-3-2, <http://www.in.gov/legislative/ic/code/title3/ar3/ch2.html> (last visited Feb. 17, 2009) (containing redistricting provisions).

The states of Category 7 have a binding redistricting commission whose “blue ribbon” membership is selected on the basis of the members’ other roles, usually political in nature, and so are likely to be weighted in favor of one of the major parties. The commission is not active until the state legislature fails to enact a legally compliant plan by a statutorily imposed deadline. The legislature must accept the redistricting plan and the governor has no veto power. Category 7 states are Mississippi (as to state legislative districts),⁷⁴ Oklahoma (as to state legislative districts),⁷⁵ and Texas (as to state legislative districts).⁷⁶

8. Category 8: States with semi-independent advisory redistricting commissions.

The members of Category 8 have an independent redistricting commission, but the redistricting plan is a proposal to the legislature rather than a binding plan. The legislature may amend the proposal or reject the proposal and enact a new plan. States in this category include Colorado (as to state legislative districts),⁷⁷ Iowa (as to U.S. congressional districts only),⁷⁸ and Vermont (inapplicable to U.S. congressional district, which is at large).⁷⁹

74. See MISS. CONST. art. 13, § 254 (directing creation of apportionment commission consisting of speaker of house, president pro tempore of senate, attorney general, secretary of state, and chief justice of supreme court, following failure of legislature to reach apportionment resolution); see also Article 13, Section 254—Senatorial and Representative Districts, <http://www.mscode.com/msconst/13/13-254.html> (last visited Feb. 17, 2009) (providing apportionment provision of state constitution).

75. See OKLA. CONST. art. V, §§ 9A, 10A, 11A; see also Section V-11A, http://www2.lsb.state.ok.us/oc/oc_5-11A.rtf (last visited on Feb. 17, 2009) (explaining that apportionment commission consists of state attorney general, Superintendent of Public Instruction, and state treasurer, should legislative reapportionment fail).

76. See TEX. CONST. art. III, § 28 (creating, upon failure of legislative redistricting, legislative redistricting board consisting of Commissioner of General Land Office, Comptroller of Public Accounts, lieutenant governor, speaker of house, and attorney general); see also Redistricting Process—Legislative Redistricting Board, http://www.tlc.state.tx.us/redist/process_lrb.htm (last visited Feb. 17, 2009) (explaining process and purpose of legislative redistricting board).

77. See COLO. CONST. art. V, § 48 (establishing eleven-member reapportionment commission charged with creating reapportionment plan that will be submitted to Colorado Supreme Court for approval); see also Colorado Redistricting and Reapportioning, http://www.state.co.us/gov_dir/leg_dir/lcsstaff/REAP/Constitution.htm#State (last visited on Feb. 17, 2009) (listing relevant sections of statute).

78. See IOWA CODE §§ 42.5-42.6 (2006) (establishing five-member temporary advisory commission, Legislative Services Agency, to aid and assist legislature in drawing U.S. congressional districts that are statutorily complaint, and creating duty to present redistricting plans to general assembly for approval and to Iowa public for comment); see Iowa Redistricting Profile, <http://www.legis.state.ia.us/Redist/profile.pdf> (last visited on Feb. 17, 2009) (outlining information on redistricting).

79. See VT. CONST. ch. II, § 73 (authorizing general assembly to provide for establishment of legislative reapportionment board to advise and assist general assembly); see also Report of the Legislative Apportionment Board: The 2001 Tentative Plan for the Vermont Senate, <http://www.leg.state.vt.us/reports/02>

9. Category 9: States with exclusive legislative responsibility for redistricting, but the task is assigned to a legislative committee.

States under Category 9 vest redistricting authority in the legislature. The legislature assigns redistricting duties to a specialized committee, but retains the right to accept or reject the recommendation subject to gubernatorial veto. Category 9 states include Georgia,⁸⁰ Kansas,⁸¹ Kentucky,⁸² Louisiana (as to U.S. congressional districts),⁸³ Michigan (as to U.S. congressional districts),⁸⁴ Mississippi (as to U.S. congressional districts),⁸⁵ North Carolina,⁸⁶ North Dakota (inapplicable to U.S. congressional seat,

Redistricting/LAB_Senate.pdf (last visited on Feb. 17, 2009) (summarizing history and plan of apportionment).

80. See GA. CODE ANN. § 21-1-2 (Supp. 2007) (implying Georgia legislature's basic constitutional authority to apportion congressional districts); see also Legislative and Congressional Reapportionment Committee, http://www.legis.ga.gov/legis/2005_06/house/Committees/reapportionment/gahlcr.htm (last visited Feb. 17, 2009) (providing overview of reapportionment committee).

81. See KAN. STAT. ANN. §§ 4-138 to -142 (Supp. 2004) (establishing current U.S. congressional districts for Kansas); see also Kansas Legislative Research Department—Redistricting—Home, <http://skyways.lib.ks.us/ksleg/KLRD/Redistrct/redistr.htm> (last visited Feb. 17, 2009) (providing Kansas redistricting information).

82. See KY. REV. STAT. ANN. § 118B.100-160 (LexisNexis 2006) (establishing authority of Kentucky legislature to draw U.S. congressional districts for Commonwealth of Kentucky and establishing current districts); see also Fair Vote, Kentucky Redistricting 2000, <http://www.fairvote.org/?page=307> (last visited Feb. 17, 2009) (providing redistricting information for Commonwealth of Kentucky).

83. See LA. REV. STAT. ANN. § 18:1276 (2004) (establishing current U.S. congressional districts for Louisiana); see also Louisiana House 2001 Redistricting Information Frequently Asked Questions, <http://house.legis.state.la.us/hredist/redist-faq.htm> (last visited Feb. 17, 2009) (providing redistricting information for Louisiana).

84. See MICH. COMP. LAWS SERV. § 3.63 (LexisNexis 2003) (authorizing legislature to establish U.S. congressional districts that must, among other things, be single-member districts, contiguous, compact, regularly numbered, compliant with federal statutes, and split county and city lines as infrequently as possible); see also Fair Vote, Michigan Redistricting 2000, <http://www.fairvote.org/?page=312> (last visited Feb. 17, 2009) (providing redistricting information for Michigan).

85. See MISS. CODE ANN. § 5-3-121 (2002) (establishing standing joint congressional redistricting committee assigned to adjust U.S. congressional districts if number of districts is altered as result of federal census); see also The Mississippi Standing Joint Reapportionment Committee, <http://www.msirc.state.ms.us/> (last visited Feb. 17, 2009) (providing redistricting information for Mississippi).

86. See N.C. GEN. STAT. § 163-201 (2003) (establishing current U.S. congressional districts for North Carolina); see also North Carolina General Assembly—NCGA—Redistricting Concepts, <http://www.ncleg.net/GIS/RandR07/Overview.html?member=> (last visited Feb. 17, 2009) (providing background on North Carolina redistricting).

which is at large),⁸⁷ New Mexico,⁸⁸ Nevada,⁸⁹ New York,⁹⁰ Oregon,⁹¹ Tennessee,⁹² Texas (as to U.S. congressional districts),⁹³ Utah,⁹⁴ Virginia,⁹⁵

87. See Fair Vote, North Dakota Redistricting 2000, <http://www.fairvote.org/?page=324> (last visited Feb. 17, 2009) (providing redistricting information for North Dakota). North Dakota has a single representative, and thus, has no statutory policy regarding the establishment of U.S. congressional districts. See *id.*

88. See N.M. STAT. ANN. § 1-15-15 (West Supp. 2006), *invalidated by* Jepsen v. Vigil-Giron, No. D-0101-CV- 2001-02177 (N.M. First Jud. Dist. Ct. 2002), *available at* http://swdb.berkeley.edu/News_Info/News_Info/Court_Cases/NM/Jep-sen_v_Vigil-Giron.pdf (establishing authority of New Mexico legislature to draw U.S. congressional districts for State of New Mexico). Although the plan enacted by this statute was eventually altered due to constitutional challenges, another plan was adopted. See N.M. STAT. ANN. § 1-15-15.1 (West Supp. 2006) (delineating composition of New Mexico congressional districts); see also Fair Vote, New Mexico Redistricting 2000, <http://www.fairvote.org/?page=321> (last visited Feb. 17, 2009) (providing redistricting information for New Mexico).

89. See NEV. REV. STAT. ANN. § 304.060-120 (LexisNexis 2002) (providing redistricting information for Nevada); Nevada Legislative Counsel Bureau District Information, <http://www.leg.state.nv.us/lcb/research/RedistReapp.cfm> (last visited Feb. 17, 2009) (same); see also Fair Vote, Nevada Redistricting 2000, <http://www.fairvote.org/?page=318> (last visited Feb. 17, 2009) (same).

90. See N.Y. STATE LAW § 110 (McKinney 2003) (establishing current U.S. congressional districts for New York); see also The New York Legislative Task Force on Demographic Research and Reapportionment, <http://latfor.state.ny.us/> (last visited Feb. 17, 2009) (providing redistricting information for New York).

91. See OR. REV. STAT. § 188.010 (2005) (establishing that Oregon legislature has authority to draw U.S. congressional districts, and must be, as much as is practicable, contiguous, equal in population, related to geographic and political boundaries, related to communities of common interest, and connected by transportation links; further providing that districts must not be drawn for purpose of favoring any political party, incumbent legislator, or diluting voting strength of any language or ethnic minority group); see also Fair Vote, Oregon Redistricting 2000, <http://www.fairvote.org/?page=327> (last visited Feb. 17, 2009) (providing redistricting information for Oregon).

92. See TENN. CODE ANN. § 2-16-102 (2003) (granting authority to Tennessee General Assembly to establish U.S. congressional districts subsequent to each federal census); see also Fair Vote, Tennessee Redistricting 2000, <http://www.fairvote.org/?page=332> (last visited Feb. 17, 2009) (providing redistricting information for Tennessee).

93. See TEX. REV. CIV. STAT. ANN. art. 197i (Vernon Supp. 2007) (establishing current U.S. congressional districts for Texas, as drawn by legislature in 2003); Texas Redistricting, <http://www.tlc.state.tx.us/redist/redist.htm> (last visited Feb. 17, 2009) (providing information about redistricting activities relating to: Texas legislature's areas of responsibility, process and legal requirements, support services provided by Texas Legislative Council, and districts resulting from process); see also Fair Vote, Texas Redistricting 2000, <http://www.fairvote.org/?page=333> (last visited Feb. 17, 2009) (providing redistricting information for Texas).

94. See UTAH CONST. art. IX, § 1 (authorizing Utah legislature to create U.S. congressional districts); Utah State Legislature—2001 Meetings—Redistricting Committee, <http://www.le.state.ut.us/Interim/2001/html/2001sperdt.htm> (last visited Feb. 17, 2009) (providing information about Utah's Redistricting Committee's membership and schedule); see also Fair Vote, Utah Redistricting 2000, <http://www.fairvote.org/?page=334> (last visited Feb. 17, 2009) (providing redistricting information for Utah).

95. See VA. CONST. art. II, § 6 (establishing authority in Virginia General Assembly to draw U.S. congressional districts that are to be contiguous, compact, and

and Wyoming (inapplicable to U.S. congressional district, which is at large).⁹⁶

10. Category 10: States subjecting legislative redistricting authority to gubernatorial veto.

Category 10 states vest total authority for redistricting in the legislature. The legislature's decision is, however, subject to gubernatorial veto. States falling into Category 10 are Arkansas (as to U.S. congressional districts),⁹⁷ Colorado (as to U.S. congressional districts),⁹⁸ Massachusetts,⁹⁹ Maryland,¹⁰⁰ Missouri (as to U.S. congressional districts),¹⁰¹ Nebraska,¹⁰² Ohio (as to U.S. congressional districts),¹⁰³ Oklahoma (as to U.S. congress-

as equal in population as practical, and providing that legislature has authority to redraw districts after each forthcoming federal census); *see also* Virginia Division of Legislative Services, Redistricting Virginia, <http://dlsis.state.va.us/> (last visited Feb. 17, 2009) (providing redistricting information for Commonwealth of Virginia).

96. *See* WYO. CONST. art. III, § 48 (granting Wyoming legislature authority to divide states into U.S. congressional districts in event that federal census entitles Wyoming to more than one U.S. congressional seat); *see also* Outline of Redistricting Information, <http://legisweb.state.wy.us/leg2/redistrict/generalinfo.htm> (last visited Feb. 17, 2009) (providing general redistricting information for Wyoming).

97. *See* ARK. CODE ANN. §§ 7-2-101 to -105 (Supp. 2005) (establishing current U.S. congressional districts for Arkansas); *see also* Fair Vote, Arkansas Redistricting 2000, <http://www.fairvote.org/?page=293> (last visited Feb. 17, 2009) (providing redistricting information for Arkansas).

98. *See* COLO. CONST. art. V, § 44 (granting Colorado General Assembly control over establishment of U.S. congressional districts); *see also* Colorado Legislative Counsel, Constitutional Provisions Controlling Reapportionment/Redistricting, http://www.state.co.us/gov_dir/leg_dir/lcsstaff/REAP/Constitution.htm#State (last visited Feb. 17, 2009) (providing state constitutional provisions controlling reapportionment and redistricting for Colorado).

99. *See* MASS. ANN. LAWS ch. 57, § 1 (LexisNexis Supp. 2006) (establishing current U.S. congressional districts for Commonwealth of Massachusetts); *see also* Fair Vote, Massachusetts Redistricting 2000, <http://www.fairvote.org/?page=311> (last visited Feb. 17, 2009) (providing redistricting information for Commonwealth of Massachusetts).

100. *See* MD. CODE ANN., ELEC. LAW § 8-701 (LexisNexis Supp. 2003) (establishing authority of Maryland legislature to create U.S. congressional districts for Maryland); Fair Vote, Maryland Redistricting 2000, <http://www.fairvote.org/?page=310> (last visited Feb. 17, 2009) (providing redistricting information for Maryland); *see also* Maryland General Assembly, Redistricting and Reapportionment, <http://redistricting.state.md.us/maryland/> (last visited Feb. 17, 2009) (providing redistricting and reapportionment information for Maryland).

101. *See* MO. REV. STAT. § 128.346 (2007) (establishing authority of Missouri legislature to create U.S. congressional districts); *see also* Fair Vote, Missouri Redistricting 2000, <http://www.fairvote.org/?page=315> (last visited Feb. 17, 2009) (providing redistricting information for Missouri).

102. *See* NEB. REV. STAT. ANN. § 32-504 (LexisNexis 2005) (establishing current U.S. congressional districts for Nebraska); *see also* Fair Vote, Nebraska Redistricting 2000, <http://www.fairvote.org/?page=317> (last visited Feb. 17, 2009) (providing redistricting information for Nebraska).

103. *See* OHIO CONST., § 11.01, *available at* <http://www.legislature.state.oh.us/constitution.cfm?Part=11&Section=01> (last visited Feb. 17, 2009) (providing redistricting information for Ohio).

sional districts),¹⁰⁴ Pennsylvania,¹⁰⁵ Rhode Island,¹⁰⁶ South Carolina,¹⁰⁷ Wisconsin,¹⁰⁸ and West Virginia.¹⁰⁹

C. The "Before and After" Test: Did Adoption of Independent Redistricting Change the Voting Behavior of Those States' Congressional Representatives?

The fact that different systems for redistricting exist, and that they provide something of a range of politicization in redistricting, serendipitously creates a state-by-state laboratory for testing the effects of different redistricting processes on the broader political process. In this light, the particular question posed can be conceptualized as whether the relatively depoliticized redistricting systems reduce partisanship in subsequent congressional voting behavior by the representatives elected to the districts drawn with relatively less concern for partisan political party opportunism, compared to other districts. One test of this potential effect, explored in this Article, compares the degree of partisanship shown in the voting records of a state's congressional delegation *before* implementation of a relatively independent redistricting system, with the degree of partisanship shown in the voting records of the same state's congressional delegation *after* a state employs a relatively independent redistricting system to redraw congressional district boundaries.

tricting information for Ohio); OHIO REV. CODE ANN. § 3521.01 (LexisNexis Supp. 2007) (establishing current U.S. congressional districts for Ohio).

104. See OKLA. STAT. tit. 14, § 5.2 (2002) (establishing current U.S. congressional districts for Oklahoma); see also Fair Vote, Oklahoma Redistricting 2000, <http://www.fairvote.org/?page=326> (last visited Feb. 17, 2009) (providing redistricting information for Oklahoma).

105. See 25 PA. CONS. STAT. ANN. § 3595.301 (West 2007) (establishing current U.S. congressional districts for Commonwealth of Pennsylvania); see also Fair Vote, Pennsylvania Redistricting 2000, <http://www.fairvote.org/?page=328> (last visited Feb. 17, 2009) (providing redistricting information for Commonwealth of Pennsylvania).

106. See R.I. GEN. LAWS § 17-4-1 (2003) (establishing authority of Rhode Island legislature to draw U.S. congressional districts for Rhode Island); see also Fair Vote, Rhode Island Redistricting 2000, <http://www.fairvote.org/?page=329> (last visited Feb. 17, 2009) (providing redistricting information for Rhode Island).

107. See S.C. CODE ANN. § 7-19-40 (Supp. 2006) (establishing current U.S. congressional districts for South Carolina); see also South Carolina Legislature Online, South Carolina Redistricting 2001, <http://www.scstatehouse.net/html-pages/redistl.html> (last visited Feb. 17, 2009) (providing redistricting information for South Carolina).

108. See WIS. STAT. § 3.001 (2006) (establishing authority of Wisconsin legislature to draw U.S. congressional districts for Wisconsin); see also Wisconsin State Legislature, Legislative Redistricting, http://www.legis.state.wi.us/ltsb/redistricting/state_of_wisconsin_profile.htm (last visited Feb. 17, 2009) (providing redistricting information for Wisconsin).

109. See W. VA. CONST. art. I, § 4 (establishing authority of West Virginia legislature to draw contiguous, compact U.S. congressional districts of as equal population as practicable); see also Fair Vote, West Virginia Redistricting 2000, <http://www.fairvote.org/?page=338> (last visited Feb. 17, 2009) (providing redistricting information for West Virginia).

With this test in mind, the authors first identify which redistricting processes were relatively independent, and second, which of those systems were used by states to redraw congressional district lines for the first time after the 2000 census—typically at the end of 2002. Recognizing some degree of uncertainty about the relative degrees of independence of the various forms of redistricting commissions and systems, the authors accepted any examples from the first eight categories of redistricting commissions in the Mercer Study as qualifying as “relatively independent” forms of redistricting systems. The authors further winnowed the target group to those states with relatively independent redistricting systems that were invoked for the first time in the 2002 redistricting cycle to redraw congressional districts in their states. Under these two criteria for testing, the following five states were selected for this study: Alabama, Arizona, Connecticut, Idaho, and Maine. In other words, the authors believe that those five states constitute the entire universe of states that redistricted their congressional districts for the first time after the 2000 census (completed near the end of 2002), using a relatively independent form of redistricting commission or system (namely, any system identified in categories one through eight of the Mercer Study of Redistricting Systems).

III. MEASURING CHANGES IN PARTISANSHIP IN CONGRESSIONAL VOTING BEHAVIOR

Next, the authors of this Article addressed another empirical challenge: identifying a particular measure of general partisanship in legislative voting behavior, so as to gauge whether a change to a more independent redistricting system might have some statistically observable effect on the degree of perceived partisanship in the aggregate of each relevant state’s congressional representatives’ voting records. Votes by any legislative representative reflect many factors. Thus, the very notion of characterizing any particular vote as categorically partisan, or any particular representative on any particular vote as excessively partisan, is problematic. Political science scholars and academicians pursued analyses of roll call voting for many years, demonstrating considerable sophistication especially on questions involving the extent of party influence over different types of votes.¹¹⁰

110. See, e.g., William H. Riker, *THE ART OF POLITICAL MANIPULATION* (1986); Gary W. Cox & Eric Magar, *How Much is Majority Status in the U.S. Congress Worth?*, 93 AM. POL. SCI. REV. 299 (1999); Gregory L. Hager & Jeffrey C. Talbert, *Look for the Party Label: Party Influences on Voting in the U.S. House*, 25 LEGIS. STUD. Q. 75 (2000); Keith Krehbiel, *Party Discipline and Measures of Partisanship*, 44 AM. J. POL. SCI. 212 (2000); Keith T. Poole & Howard Rosenthal, *D-NOMINATE After 10 Years: A Comparative Update to Congress: A Political-Economic History of Roll-Call Voting*, 26 LEGIS. STUD. Q. 5 (2001); James M. Snyder, Jr. & Tim Groseclose, *Estimating Party Influence on Roll-Call Voting*, 44 AM. J. POL. SCI. 193 (2000); James M. Snyder, Jr. & Tim Groseclose, *Estimating Party Influence on Roll Call Voting: Regression Coefficients Versus Classification Success*, 95 AM. POL. SCI. REV. 689 (2001).

The authors of this Article, however, are particularly interested in the perception of partisanship overall, as viewed not by academicians that gauge parties' power or other forces that influence voting behavior, but rather by the most knowledgeable political participants: the very partisans who craft the questions to be voted upon and count the subsequent votes.¹¹¹ Since the 1980s, the most widely acclaimed source of such data has indisputably been the *National Journal*, whose board of experts devised measures of the degrees to which particular congressional votes conform to "conservative" or "liberal" characterizations.¹¹² Washington onlookers

111. See generally Eilperin, *supra* note 3 (writing on partisanship in U.S. House of Representative).

112. The *National Journal* explained the methodology used in generating the ratings:

The ratings system was first devised in 1981 under the direction of William Schneider, a political analyst and commentator, and a contributing editor to *National Journal*, who continues to guide the calculation process. Data processing and statistical analysis were performed by Information Technology Services of the Brookings Institution.

The votes in each issue area were subjected to a principal-components analysis, a statistical procedure designed to determine the degree to which each vote resembled other votes in the same category (the same members tending to vote together). Ten of the 187 votes (two in the Senate and eight in the House) were dropped from the analysis because they were statistically unrelated to others in the same issue area. These typically were votes that reflected regional and special-interest concerns, rather than general ideology.

The analysis also revealed which yeas correlated with which nays votes within each issue area (members voting yeas on certain issues tended to vote nays on others). The yeas and nay positions on each roll call were then identified as conservative or liberal.

Each roll-call vote was assigned a weight from 1 (lowest) to 3 (highest), based on the degree to which it correlated with other votes in the same issue area. A higher weight means that a vote was more strongly correlated with other votes and was therefore a better test of economic, social, or foreign-policy ideology. The votes in each issue area were combined in an index (liberal or conservative votes as a percentage of total votes cast, with each vote weighted 1, 2, or 3).

Absences and abstentions were not counted; instead, the percentage base was adjusted to compensate for missed roll calls. A member who missed more than half of the votes in any issue category was scored as 'missing' in that category (shown as an asterisk [*] in the vote-rating tables).

Members were then ranked from the most liberal to the most conservative in each issue area. These rankings were used to assign liberal and conservative percentile ratings to all members of Congress.

The liberal percentile score means that the member voted more liberal than that percentage of his or her colleagues in that issue area in 2006. The conservative figure means that the member voted more conservative than that percentage of his or her colleagues.

For example, a House member in the 30th percentile of liberals and the 60th percentile of conservatives on economic issues voted more liberal than 30 percent of the House and more conservative than 60 percent of the House on those issues, and was tied with the remaining 10 percent. The scores do not mean that the member voted liberal 30 percent of the time and voted conservative 60 percent of the time.

use the *National Journal's* annual aggregation of such data—more than 100 votes a year are used for the analysis—as the best available independent approximation of where on the political spectrum an individual congressional representative lies for the purposes of partisan labeling.¹¹³ Due to the authors' concern with the interplay, if any, between redistricting and the perception of partisanship, it seems appropriate to credit the perceptions of those who are most intimately involved in the relevant political process. Thus, the *National Journal* approach to gauging partisanship in roll call voting is more appropriate than having the academic authors of this Article choose from a number of different academic approaches to analyzing the "partisanship" (however academically defined) evidenced in roll-call voting. Indeed, none of the academic approaches appear to be extensively relied upon by the actual participants in the political processes, and each academic approach seems to have been designed for more specialized purposes than those at stake in this Article.

As a result, the authors aggregated *National Journal* Vote Ratings for all the representatives in each of the five surveyed states for the periods of 1996-2002, before a redistricting in each state, and from 2003-2006, after a redistricting in each state using a relatively more independent form of redistricting system.

A. *Our Statistical Analysis of Whether the Introduction of Independent Redistricting Reduced Partisanship in Voting by District Representatives*

First, we generated a partisan variable that is the absolute difference between the *National Journal's* "Liberal Score" (CLS) and "Conservative Score" (CCS) for each of the five states' aggregated congressional delegations, both before and after independent redistricting took effect in those states at the end of 2002. Before we could determine whether the average

Percentile scores can range from a minimum of 0 to a maximum of 100. Some members, however, voted either consistently liberal or consistently conservative on every roll call. As a result, there are ties at both the liberal and the conservative ends of each scale. For that reason, the maximum percentiles are usually less than 100.

Members also receive a composite liberal score and a composite conservative score, each of which is an average of their five issue-based scores. Members who missed more than half of the votes in any of the three issue categories do not receive a composite score (shown as an asterisk [*] in the vote-rating tables).

To determine a member's composite liberal score, for example, first add the liberal scores in all three issue areas. Next, in each issue area, calculate 100 minus the member's conservative score and add the three results together. The two figures are then combined and divided by 6 (the number of individual scores).

Methodology: How the 2007 Voting Ratings Are Calculated, NAT'L J., Mar. 7, 2008, available at <http://nationaljournal.com/voteratings/methodology.htm>. Ratings from earlier years are available by arrangement with the *National Journal*, which maintains a proprietary interest in the information.

113. See Telephone Interview with Tom Bonier, Political Analyst, Nat'l Comm. for an Effective Cong. (Oct. 9, 2007) (on file with author).

level of partisanship fell after the redistricting at the end of 2002 using a relatively independent form of redistricting, and thus, whether the mean value of our partisan variable had fallen, we had to determine if the variance, and therefore, the standard deviation before the redistricting, both within a state and across all states, was significantly different from the variance after redistricting. The standard deviation ratio tests are shown in Table 1 below. Our null hypotheses are that the pre- and post-redistricting standard deviations are the same and, thus, the ratio of variances is one. The alternative hypotheses are that the pre- and post-redistricting variances are different and, thus, statistically significantly different from one. Table 1 reports the standard deviation ratio test results for the overall sample, including for all five states as well as for each individual state.

TABLE 1: PARTISANSHIP STANDARD DEVIATION RATIO TESTS

	Years	Overall	State Representative Caucus				
		State Averages	Alabama	Arizona	Connecticut	Idaho	Maine
Mean Overall	1997-2006	40.98	53.52	56.37	33.75	45.08	59.61
Std. Dev. Overall	1997-2006	14.77	25.51	26.94	28.90	18.64	14.87
Mean Pre-redistricting	1997-2002	45.67	56.43	57.48	34.87	54.83	65.65
Std. Dev. Pre-redistricting	1997-2002	14.34	25.42	24.57	26.33	15.04	12.76
Mean Post-redistricting	2003-2006	33.93	49.15	55.12	31.74	30.45	50.55
Std. Dev. Post-redistricting	2003-2006	12.71	25.47	29.72	33.69	13.40	13.72
Standard Deviation Ratio Test							
Ho: ratio = 1							
f-value		1.27	1.00	0.68	0.61	1.26	0.86
Degrees of Freedom		29, 19	41, 27	35, 31	35, 19	11, 7	11, 7
Ha: ratio \neq 1							
2*Pr(F > f) =		0.59	0.97	0.28	0.20	0.78	0.80

* Significant at alpha = .05
** Significant at alpha = .01

Looking at the overall average level of partisanship in the states, we see that the average level of partisanship appears lower but statistically indistinguishable after redistricting for the particular states of Alabama, Arizona, and Connecticut. Over the same period, however, we see a statistically significant reduction in partisanship in Idaho and Maine, and most significantly, in the aggregated data for all five states surveyed. In other words, we can say at the 99 percent confidence level that the degree of partisanship in voting behavior of representatives comprising the pool of five states *changed* after the introduction in those states of relatively independent redistricting after about late 2002, and furthermore, that the

TABLE 2: PARTISANSHIP MEANS TESTS

	Years	Overall	State Representative Caucus				
		State Averages	Alabama	Arizona	Connecticut	Idaho	Maine
Mean Overall	1997-2006	40.98	53.52	56.37	33.75	45.08	59.61
Std. Dev. Overall	1997-2006	14.77	25.51	26.94	28.90	18.64	14.87
Mean Pre-redistricting	1997-2002	45.67	56.43	57.48	34.87	54.83	65.65
Std. Dev. Pre-redistricting	1997-2002	14.34	25.42	24.57	26.33	15.04	12.76
Mean Post-redistricting	2003-2006	33.93	49.15	55.12	31.74	30.45	50.55
Std. Dev. Post-redistricting	2003-2006	12.71	25.47	29.72	33.69	13.40	13.72
Mean (1997-2002) - Mean (2003-2006)							
Ho: = 0							
t-value		2.96	1.17	0.36	0.39	3.70	2.52
Degrees of Freedom		48.00	68.00	66.00	54.00	18.00	18.00
Ha: $\neq 0$							
Pr(T > t) =		0.00**	0.24	0.72	0.70	0.00*	0.02**
Ha: > 0							
Pr(T > t) =		0.00**	0.12	0.36	0.35	0.00*	0.01**

* Significant at alpha = .05
** Significant at alpha = .01

degree of partisanship in the aggregate meaningfully *declined* after the introduction of relatively independent redistricting after late 2002.

B. *Were National Trends or Other Key Variables Skewing the Five-State Data?*

At least three alternative hypotheses would also yield differences in the mean levels of partisanship over time in these selected states. First, there may have been a national trend due to some exogenous factor that caused all states, not just those states newly undergoing independent redistricting, to experience a reduction in the level of partisanship. Second, these states may have unique characteristics, not accounted for in the above means tests, that explain why these five states in particular experienced both depoliticized redistricting and declining levels of partisanship. Third, it is possible that the unique party affiliations of the representatives in these five states may explain their levels of partisanship. In other words, other states with party representation patterns similar to the patterns present in these five states may have experienced a similar reduction in the level of partisanship because of the pattern of party affiliation and not because of independent redistricting.

In order to address these alternative hypotheses as to why differences in the level of partisanship may have occurred, we generated our measure of partisanship using the *National Journal's* Vote Ratings for all House

members in 1998 and 2006, times in non-presidential years both before and after the five-state group instituted independent redistricting. Initially, we calculated the average level of partisanship by each state's caucus. We then regressed the following equation:

$$partisanship_{j,t} = \alpha + \beta_1(independent_redistricting_{j,t}) + \beta_2(year = 2006) + \gamma(state_i) + e_{j,t}$$

(Eq. 1)

for each state *j* in year *t*. *Independent redistricting* is an indicator variable that is one if the election takes place after a new independent redistricting policy was instituted, *year* is an indicator variable for observations during the 2006 election, and *state* is the vector of dummies for each state. Including the *year* indicator variable estimates the national trend in partisanship across all caucuses. The *state* indicator variable accounts for any unique state characteristics that may affect the level of partisanship by each state caucus.

The results are shown in Table 3, Estimate 3, below. Accounting for both differences across states and the possibility of a national trend in partisanship, a state that independently redistricted in 2002 witnessed a 10 percentage point decline in the average level of partisanship of its state caucus. Unfortunately, the estimated coefficient is imprecisely estimated,

TABLE 3: OVERALL STATE PARTISANSHIP

	Estimate 1	Estimate 2	Estimate 3
Post Independent Redistricting	2.587	4.936	-10.054
	[0.410]	[0.746]	[1.277]
Year 2006 dummy		-4.463	-2.964
		[1.541]	[0.706]
Constant	30.541	32.655	38.882
	[11.008]***	[10.260]***	[18.529]***
State Dummies	No	No	Yes
Observations	100	100	100
R-squared	0.001	0.011	0.802
Robust t statistics in brackets			

* significant at 10%; ** significant at 5%; *** significant at 1%

with an estimate significantly different from zero just fractionally shy of a 90 percent confidence interval (89.3 percent). Although it does appear that the average level of partisanship by state caucuses nationwide was marginally lower in 2006 than in 1998, due to the negative coefficient estimated on the *year* indicator variable, the shift is not statistically significant.

This result, however, may just be an artifact of party affiliation or the construction of the average. Furthermore, averaging across the entire caucus does not capture how individual representatives may alter their voting patterns given how their constituents are grouped. In order to address such possibilities, we returned to the voting records of all 435 individual

representatives to determine if individual representatives within a state vote with less partisanship after independent redistricting. We then regressed the following:

$$\text{partisanship}_{i,j,t} = \alpha + \beta_1(\text{independent_redistricting}_{j,t}) + \beta_2(\text{year} = 2006) + \gamma(\text{state}_i) + \delta(\text{party}_{i,j,t}) + e_{i,j,t}$$

(Eq.2)

where i, j, t is the representative in district i , in state j , during year t . *Independent redistricting* is an indicator variable that is one if the individual representative's election takes place after a new independent redistricting policy was instituted, *year* is an indicator variable for observations during the 2006 election, *state* is the vector of dummies for each state, and *party* is an indicator variable representing the representatives party affiliation. We are again accounting for any national trend in partisanship by using the variable *year* and state characteristics that may affect the level of partisanship through the use of the *state* indicator variable. Furthermore, by including *party* affiliation, we are now holding constant the effect party affiliation may have on the level of partisanship.

The results, shown in Table 4, are more conclusive as seen in Estimate 4.¹¹⁴ Holding constant state characteristics and a representative's party

TABLE 4: INDIVIDUAL REPRESENTATIVE PARTISANSHIP

	Estimate 1	Estimate 2	Estimate 3	Estimate 4
Post Independent Redistricting	-5.66 [1.772]*	-5.944 [1.641]	-12.928 [3.543]***	-12.479 [3.321]***
Year 2006 dummy		0.551 [0.335]	0.687 [0.416]	0.68 [0.415]
Constant	49.585 [26.040]***	49.319 [29.687]***	37.056 [44.914]***	40.637 [8.500]***
State Dummies			Yes	Yes
Party Membership Dummy				Yes
Observations	861	861	861	861
R-squared	0.001	0.002	0.148	0.152
Robust t statistics in brackets				

* significant at 10%; ** significant at 5%; *** significant at 1%

affiliation while accounting for any possible national trend in partisanship, a representative from a state that newly, independently redistricted in 2002 voted with less partisanship. The estimated coefficient reports a 12.5

114. With 435 districts represented in 1998 and 2006, the total number of observations should sum to 870. For 1998, however, the *National Journal* does not report a voting score for Georgia district six, New Mexico district one, and Texas district twenty. For 2006, the *National Journal* does not report a voting score for California district fifty, Florida district eleven, Illinois districts fourteen and seventeen, New Jersey district thirteen, and Texas district twenty-two.

percentage point reduction and is significant at the 99 percent confidence interval or alpha equal 0.01.

In short, we have taken some steps to consider whether other factors may be affecting the primary results explored in this Article. Though we cannot, and do not, say that other factors have no bearing on partisanship in voting by congressional representatives, we can say that some of the most likely extrinsic factors do not appear to be overwhelming the central observation of this Article: that the introduction of independent redistricting reduces perceived partisanship in the voting records of congressional representatives from those states. After accounting for (1) a possible national trend, (2) individual differences between the studied states and all other states, and (3) the particular pattern of party affiliation in the five states compared with other states, we still observe a statistically significant reduction in partisanship among states newly introducing depoliticized systems for redistricting.

IV. CONCLUSIONS AND IMPLICATIONS

We examined those five states that redistricted for the first time at about the end of 2002 using relatively politically independent redistricting systems. We conclude that there is statistically significant evidence of a reduction in the most popular conventional measure of perceived partisanship in the voting behavior of congressional representatives.¹¹⁵ Based on this finding, we hypothesize, but have not proven, the converse: that there is some statistically significant causal connection between relatively politicized forms of redistricting and partisanship perceived in the subsequent voting behavior of congressional representatives elected from those districts.

The study underlying this Article does not prove why the introduction of independent redistricting reduces congressional partisanship, a question warranting more study. It seems plausible, however, that the partisanship reduction results from a reduction in the number of districts packed with unusual concentrations of voters from one or another party. Redistricting that results in "de-packing" would result in the affected representatives being answerable to a more mixed electorate, which in turn would encourage the affected representatives to consider a broader array of interests, in effect becoming more centrist.

To check this hypothesis in the future, one might expect to find that states having a recent history of bipartisan gerrymandering would show greater reductions in partisanship after the introduction of independent redistricting than states having a recent history of partisan gerrymandering, because partisan gerrymandering is associated with only partial pack-

115. The conventional measure of perceived partisanship is the reduction in the variance between the *National Journal* Vote Ratings's liberal and conservative voting scores for individual legislators when that data is aggregated by relevant state.

ing of districts, while bipartisan gerrymandering results in more uniformly packed districts. Another immediate need for further study involves how to reconcile the tentative result of this Article, which concludes that independent redistricting reduces perceived partisanship, with the tentative result of the draft paper by Professors McCarty, Poole, and Rosenthal, which concludes that party affiliation plays a dominant role in partisanship.¹¹⁶

Although we presented statistically significant evidence about the ability of independent systems for redistricting to reduce the conventional appearance of partisanship in congressional voting behavior, we make no claim that there is an exclusive or primary relationship between relatively politicized forms of redistricting and excessive partisanship by affected congressional representatives. Indeed, the authors readily concede that there likely are many other forces at work in fostering an environment conducive to political partisanship, and conversely, in potentially undermining the conditions conducive to political partisanship. We would not be surprised, for instance, if further research shows that individual repre-

116. See McCarty et al., *supra* note 24 (dismissing causal link between Congressional polarization and partisan gerrymandering). Complementary readings of the two papers seem possible, although it is also possible that their respective conclusions conflict. The McCarty, Poole, and Rosenthal paper concludes that party identification is strongly aligned with partisanship of voting record, and that “the centers of the two major parties have drifted further apart” for reasons that have little to do with redistricting.

Even if true across all congressional districts, such a conclusion would not necessarily mean that redistricting does not have a contributing effect on polarization. Moreover, it seems that the McCarty, Poole, and Rosenthal paper focuses in significant part on estimates about a factually small sample of moderate districts that exhibit so-called “intra-district divergence” and that do not exhibit sorting effects, while under-examining the phenomena of districts exhibiting sorting effects (i.e., conservative constituencies electing Republicans who vote conservatively, and liberal constituencies electing Democrats who vote liberally). If so, their paper may structurally avoid considerations of possible evidence of excessive partisanship in the increasingly “strong” safe-seat districts that show sorting effects.

There is some reason to suspect that the voting records of representatives from districts with strong majorities favoring the representatives’ own parties may skew in even more of a partisan direction than the respective constituencies’ presidential voting performance might predict, and hence be evidence of excessive partisanship by the representatives (rather than just the normal degree of partisanship that could be expected by representatives merely attempting to mirror the degree of partisanship exhibited by the underlying constituent base). Indeed, the kind of polarization analyzed in the McCarty paper may be a different kind of polarization than what is conceptualized in this paper. McCarty et al. state, “Some of the increase in polarization is due to an increase in the congruence between a district’s characteristics and the party of its representative. Republicans are more likely to represent conservative districts and Democrats are more likely to represent liberal ones.” The authors of this Article would not describe congruence between a constituency’s presidential voting performance and its representative’s voting record as exemplifying excessive partisanship, or polarization. In any event, McCarty, Poole, and Rosenthal do concede that the elimination of districting altogether in favor of statewide elections would “roll polarization back to the level of the mid-1990s.” Insofar as our paper is only making a claim that independent redistricting can cause marginal reductions in partisanship, the basic claims may still be practically reconcilable.

sentatives may exhibit higher degrees of perceived partisanship in voting to the extent those representatives are subjected to party discipline and/or counted in party leadership positions. Another potential set of issues include the effects of tenure, particular party affiliation, race, age, and gender on partisanship in voting. A different perspective might be gleaned from analyzing how constituent demographics, constituent party affiliations, and constituent voting patterns in other settings may have some bearing on partisanship in a congressional representative's voting behavior.

Of course, the authors make no claim that there is any exclusive or primary causal relationship between the use of independent redistricting systems and reductions in the partisanship shown in the voting behavior of congressional representatives elected from those districts. Presumably, partisanship may be reduced in a number of ways, only one of which may involve adoption of relatively depoliticized systems for redistricting. Nonetheless, the authors note that former Representative Hamilton expressed hope in adjusting the states' systems for redistricting if such adjustments would produce even a "little" change in overall congressional partisanship.¹¹⁷ Therefore, from the vantage point of Representative Hamilton, and more generally as a matter of scholarly interest about the potential interconnectedness of partisanship in the redistricting process and other incidences of partisanship in American political life, our limited findings are of some interest.

As to independent redistricting commissions and related systems for depoliticizing redistricting, it will be useful to confirm through other tests whether they do reduce voting partisanship and whether they will continue to have such effects after an initial switch. Moreover, especially for states considering adopting new forms of independent redistricting systems, as well as for states contemplating changes to existing systems, it would be useful to know whether particular types of relatively depoliticized redistricting systems are more effective than others at reducing partisanship overall. It will be interesting to sift through the effects of the next round of redistricting in the continuing reapportionment revolution, comparing and contrasting the experience of state caucuses that are selected through different techniques. Meanwhile, more empirical and analytical work still can be done on the historical record that already exists, as we continue to seek out clues into how and whether different types of redistricting decisions affect the composition of legislative bodies and the subsequent behavior of legislators.

Even without changes in the laws governing redistricting, however, there is reason to suspect that partisanship in redistricting may change on its own. It will be intriguing to gauge, for instance, the extent to which

117. See Hamilton, *supra* note 5 (seeking to reduce congressional partisanship).

Justice O'Connor was correct in *Davis v. Bandemer*¹¹⁸ to observe that partisanship in redistricting is self-regulating, that is, that parties will not overdo it without suffering painful negative consequences.¹¹⁹ The 2006 congressional election reversal for the Republicans, in which more seats proved to be at play than had previously been predicted by many onlookers, underlines the latent threat of democratic discipline.¹²⁰ With that experience relatively fresh at hand, one could imagine the parties taking somewhat different approaches to redistricting after the 2010 census, even without regulatory interventions to depoliticize the process as a formal matter.

Finally, the authors recognize more fundamentally that there may be valid reason to question the wholesale normative revulsion to the concept of partisanship, whether in the particular case of redistricting or in the general case of congressional voting patterns. Is partisanship wholly normatively undesirable, or is it defensible to the extent that it helps sharpen choices and issues, provides a way for a potential third party to undermine the political duopoly, facilitates the expression of what a majority of voters in a district wishes to express about issues on the political agenda, or expresses absolute, uncompromising distinctions between competing principles? We envision a more nuanced approach to partisanship than has so far accompanied the literature on the subject.

118. 478 U.S. 109 (1986).

119. *See id.* at 152 (O'Connor, J., concurring) (listing reasons partisan gerrymandering is likely "self-limiting enterprise").

120. On a micro-political level, one might loosely view Tom DeLay's downfall as a form of discipline for his prominent role in the national spectacle of the mid-decennial 2003 Texas redistricting. *See, e.g.,* Bickerstaff, *supra* note 38 (relating support of partisan redistricting to demise of Congressman Delay's career). Elbridge Gerry, gerrymandering's namesake, himself surrendered the governorship of Massachusetts in an electoral loss the year following his oversight of the publicly ridiculed, and now-classic, example of gerrymandering.